No. 141, Original

RECORD AND BRIEFS

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In The
# Supreme Court of the United States

STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

*Defendants.*

**On Exceptions to the First Interim Report of the Special Master**

## ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY'S *AMICUS CURIAE* BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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The Albuquerque Bernalillo County Water Utility Authority ("Water Authority") submits this *amicus curiae* brief in support of the State of New Mexico's Exceptions to the First Interim Report of the Special Master and Brief in Support dated June 9, 2017 ("New

Mexico's Brief on Exceptions to the First Interim Report"), pursuant to Sup. Ct. R. 37.4.[1] The Water Authority brings to the Court's attention issues not raised in New Mexico's Brief on Exceptions to the First Interim Report, namely: 1) the potential adverse effect on New Mexico's Rio Grande Compact apportionment in the Middle Rio Grande above Elephant Butte Reservoir that results from the Special Master's recommendation for a state line delivery obligation that relies on Texas' allegation of a "1938 condition," and 2) the Special Master's recommendation that New Mexico relinquish State control over water resources, including all surface water and groundwater below Elephant Butte Reservoir.[2] Both recommendations could adversely affect the Water Authority, other water users in the Middle Rio Grande, and have significant consequences in the western United States where U.S. Bureau of Reclamation ("Bureau of Reclamation" or "Reclamation") projects are operated.

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[1] The Water Authority is comprised of the City of Albuquerque, an incorporated New Mexico municipality, Bernalillo County, and the Village of Los Ranchos. All are political subdivisions of the State of New Mexico. While the Water Authority can file an *amicus* brief as of right pursuant to Sup. Ct. R. 37.4 as a "city, county, town, or similar entity," it nonetheless provided notice to all parties of its intent to file an *amicus curiae* brief.

[2] The Water Authority supports the Special Master's recommended disposition of Elephant Butte Irrigation District's Motion to Intervene and El Paso County Water Improvement District No. 1's Motion to Intervene. *See* First Interim Report at 237-77.

## INTEREST OF *AMICUS CURIAE*

The Water Authority is the largest provider of municipal water in New Mexico, located in central New Mexico, 150 miles upstream of Elephant Butte Reservoir, in the Middle Rio Grande. The Water Authority is responsible for providing a potable water supply to more than 675,000 people in Albuquerque and Bernalillo County. The Water Authority's drinking water supply comes from two sources. First, it has groundwater wells located in the Middle Rio Grande Underground Water Basin, authorized and administered by the New Mexico State Engineer under Permit No. RG-960 *et al.* Second, it has a perpetual contract for 48,200 acre-feet per year of imported Colorado River water from the San Juan-Chama Project ("SJCP"), a federal Reclamation project, administered under State Engineer Permit No. SP-4830. The Water Authority conjunctively manages its imported SJCP surface water with its groundwater. The volume and timing of both sources of supply are dependent on native water supplies available to New Mexico under the Rio Grande Compact, including river operations of the Middle Rio Grande Project for irrigation of lands within the Middle Rio Grande Conservancy District ("MRGCD").[3] The Water Authority's drinking water supply, in fact, all water use in the Middle Rio Grande, is dependent on continued Rio Grande Compact accounting and

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[3] The Middle Rio Grande Project is a Bureau of Reclamation project that includes storage in El Vado Reservoir on the Rio Chama that provides water for irrigation of approximately 60,000 acres in the Middle Rio Grande.

administration in the Middle Rio Grande as it has been done historically and New Mexico State Engineer jurisdiction over its surface water and groundwater supplies.

## BACKGROUND

### 1. Rio Grande Compact.

The Rio Grande was apportioned among the states of Colorado, New Mexico, and Texas by the Rio Grande Compact of 1938. *See* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"). Three separate and distinct river segments are considered for purposes of Rio Grande Compact administration in New Mexico. *See Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 1993-NMCA-009, 115 N.M. 229, 849 P.2d 372. The Upper Rio Grande is from the Colorado-New Mexico state line to Otowi Gage. The Middle Rio Grande is from Otowi Gage to Elephant Butte Reservoir. The Lower Rio Grande runs from Elephant Butte Reservoir to the New Mexico-Texas state line.

Pursuant to Article III of the Rio Grande Compact, Colorado is obligated to deliver a percentage of the recorded upstream inflows to a gaging station near Lobatos, CO, near the Colorado-New Mexico state line.

Article IV, as amended, specifies New Mexico's delivery obligation as being into Elephant Butte Reservoir and is determined from a supply index from inflow

recorded at a gaging station at Otowi, New Mexico. The Resolution adopted at the Compact Commission meeting on February 14-16, 1949, changed New Mexico's point of delivery from San Marcial to Elephant Butte Reservoir, and revised the measurement of deliveries in Article IV. One significant element of the Rio Grande Compact is that New Mexico in the Middle Rio Grande is entitled to use of the tributary inflows between Otowi Gage and Elephant Butte Reservoir. This means that the amount of water available for use in the Middle Rio Grande is not strictly related to the year to year variation from the supply index at Otowi Gage but also by the amount of tributary inflow which varies from year to year.

Under Article VI of the Compact, the upstream states of Colorado and New Mexico are allowed to accrue debits and to erase Compact debits by an "actual spill" at Elephant Butte Reservoir. Colorado can accrue 100,000 acre-feet of debits and New Mexico can accrue 200,000 acre-feet of debits. An "actual spill" erases debits and re-starts Compact accounting.

The balance of agricultural, municipal, and interstate interests is held together by these key provisions of the Rio Grande Compact. The apportionment set forth in the Rio Grande Compact gives considerable latitude to the upstream states in terms of managing annual deliveries. Articles III, IV, and VI provide significant flexibility in Compact operations. The Compact does not impose specific, fixed delivery obligations independent of river conditions and the two upstream states are not penalized by shortfalls in individual

years. Instead, Article IV provides a highly flexible apportionment that reflects inflow in any given year in New Mexico, and sets its delivery obligation accordingly. Article VI permits the upstream states to accrue debits instead of being charged for a yearly underdelivery. The Compact has operated successfully under long periods of debits, *i.e.*, between the actual spills of 1942 and 1985. *See generally* S.E. Reynolds, Phillip B. Mutz, *Water Deliveries Under the Rio Grande Compact*, 14 N.R.J. 201 (1974).

There is nothing in Articles III, IV, or VI of the Rio Grande Compact, or the Compact's historical administration, that suggests Colorado or New Mexico have a fixed delivery obligation. In fact, the Rio Grande Compact gives a highly flexible apportionment to the Middle Rio Grande as demonstrated by 80 years of actual Compact accounting and administration.

## 2. Water Administration in the Middle Rio Grande.

The Water Authority is located in the Middle Rio Grande. The Middle Rio Grande contains important components of New Mexico's economy including the cities of Albuquerque, Santa Fe, Rio Rancho, Espanola, Belen, and Socorro, and the communities of Bernalillo and Los Lunas. Straddling the Rio Grande is the MRGCD, a quasi-State entity which was rehabilitated by the Bureau of Reclamation in the 1950s.

The New Mexico State Engineer has jurisdiction over all surface water in New Mexico, including the Middle Rio Grande, by virtue of the surface water code of 1907. *See* NMSA 1978, § 72-1-1 (1907); NMSA 1978 §§ 72-5-1 *et seq.* (1907). Prior to the adoption of the surface water code, acquisition and use of surface water was governed by the common law of prior appropriation.

By virtue of the groundwater code of 1931, the New Mexico State Engineer acquires jurisdiction over groundwater only when he has "declared" an underground water basin having reasonably ascertainable boundaries. *See* NMSA 1978, §§ 72-12-1 *et seq.* (1931). Prior to the declaration of a groundwater basin, the acquisition and use of groundwater was also governed by the common law. The result of the groundwater code is a patchwork of groundwater basins throughout New Mexico with different inception dates on which the groundwater basin was declared. The Rio Grande Underground Water Basin, extending from Taos to Elephant Butte Reservoir, was declared by the New Mexico State Engineer on November 29, 1956.

The native Middle Rio Grande water supply is augmented with imported surface water from the San Juan River, a tributary of the Colorado River, by the San Juan-Chama Project, 43 U.S.C. §§ 615 *et seq.* The SJCP is a Bureau of Reclamation project that imports a portion of New Mexico's Colorado River allocation from diversions in Colorado which are conveyed into New Mexico through a series of tunnels for ultimate storage in Heron Reservoir. Heron Reservoir is located

on the Rio Chama, a tributary to the mainstem Rio Grande, and has a storage capacity of 401,000 acre-feet. Stored Colorado River water is released from Heron Reservoir to the SJCP contractors on an annual basis in accordance with contracts. The Water Authority stores a portion of its SJCP allocation in Abiquiu Reservoir, 40 miles downstream of Heron Reservoir, for release and use within the City of Albuquerque and Bernalillo County. Imported water is the private property of the importer. *See Carangelo v. Albuquerque-Bernalillo Cnty. Water Util. Auth.*, 2014-NMCA-032, 320 P.3d 492. SJCP water is owned by the Water Authority, other municipalities, MRGCD, and various Indian tribes.

There are three reservoirs in New Mexico located upstream of the supply index gage at Otowi. From highest elevation to lowest elevation they include Heron Reservoir (401,000 acre-feet capacity) which provides storage exclusively for imported SJCP water, El Vado Reservoir (198,000 acre-feet capacity) which provides storage for Middle Rio Grande Project native Rio Grande water and SJCP water when space is available, and Abiquiu Reservoir which is a U.S. Corps of Engineer flood control reservoir that allows for storage of SJCP water (200,000 acre-feet capacity). All the reservoirs are considered post-1929 reservoirs for the purpose of Rio Grande Compact administration (Articles VII and VIII), although currently only El Vado Reservoir stores native Rio Grande water.

**3. Texas' Complaint.**

Texas' Motion for Leave to File Complaint, Jan. 2013 ("Texas' Complaint") is premised on the theory that Texas entered into the Rio Grande Compact under the fundamental premise that "the operation of the Rio Grande Project by the United States, and the Rio Grande Project's allocations to Texas, were recognized and protected by the Rio Grande Compact. . . ." Texas' Complaint at ¶ 11. Texas acknowledges that "[t]he Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas; nor did it articulate a specific state-line delivery allocation." *Id.* at ¶ 10. Texas nevertheless asserts that the Compact:

> [R]elied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas.

*Id.*

Texas then imputes this theory to the Compact, although by its plain terms Article IV requires deliveries into Elephant Butte Reservoir, not at the state line. *Id.* at ¶ 13. The key "credits and debits" clause in Article VI of the Compact is alluded to in ¶ 14 of Texas' Complaint, but its significance is ignored, likely because historical Compact administration does not

square with the allegations in Texas' Complaint. *Id.* at ¶ 14.

The crux of Texas' Complaint is that "New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Rio Grande Project and under the Rio Grande Compact." *Id.* at ¶ 18. A critical assumption in Texas' case theory is that "[t]he Rio Grande Compact is predicated on the understanding that delivery of water at the New Mexico-Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed." *Id.* In other words, Texas is claiming that implied in the Rio Grande Compact is a fixed state line delivery based upon a "1938 condition." Texas claims that:

> New Mexico, through the actions of its officers, agents, and political subdivisions, has increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground, downstream of Elephant Butte Dam, by individuals or entities within New Mexico for use within New Mexico.

*Id.*

Texas does not address the disconnect between imputing a fixed delivery obligation below Elephant Butte Reservoir based upon an implied "1938 condition" with the variable annual deliveries allowed under Article IV of the Compact and the system of debits and credits provided under Article VI of the Compact.

**4. The United States' Complaint in Intervention.**

The United States sought intervention on the grounds that "distinctively federal interests, best presented by the United States itself, are at stake," citing *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). *See* Motion of the United States for Leave to Intervene as a Plaintiff, Feb. 2014 ("United States' Motion for Leave to Intervene") at 1-2. The United States summarized its interests as concerning "water released by the Rio Grande Project (Project), a Bureau of Reclamation project that the Department of the Interior operates, including by setting the diversion allocations for water users who have contracts for delivery of Project water." *Id.* at 2. The United States asserted that its "interest in how the Project is operated is a distinctively federal interest that is best presented by the United States." *Id.* The United States framed its interest under the Rio Grande Compact by stating: "[t]he Court's interpretation of the parties' rights and obligations under the Compact would affect how the Bureau of Reclamation calculates those diversion allocations." *Id.*

The United States further claimed "a distinct interest in ensuring that water users who either do not have contracts with the Secretary of the Interior under the Project, or who use water in excess of contractual amounts, do not intercept or interfere with release and delivery of Project water that is intended for Project beneficiaries. . . ." *Id.* The United States' Complaint in Intervention states:

> 12. Only persons having contracts with the Secretary may receive deliveries of water, including seepage and return flow, from a Reclamation project. See, *e.g.*, 43 U.S.C. 423d, 423e, 431, 439, 461. Accordingly, the only entity in New Mexico that is permitted to receive delivery of Project water is EBID, pursuant to its contract with the Secretary.

*See* United States' Complaint in Intervention, Feb. 2014 ("United States' Complaint in Intervention") at ¶ 12.

Combining its claim that all groundwater and surface water below Elephant Butte Dam is Rio Grande Project water with its assertion that anyone using Project water must have a federal Reclamation contract, the United States seeks to federalize the Lower Rio Grande in New Mexico, *i.e.*, allocate and administer all groundwater and surface water below Elephant Butte Reservoir.

**5. First Interim Report of the Special Master.**

The First Interim Report of the Special Master was issued on February 9, 2017 ("First Interim Report"). The Special Master recommended denial of New Mexico's Motion to Dismiss Texas' Complaint and the granting of New Mexico's Motion to Dismiss the United States' Complaint in Intervention. Nevertheless, he recommended that the United States be granted leave to participate pursuant to 28 U.S.C. § 1251(b)(2) under the Court's discretionary, non-exclusive original

jurisdiction to pursue claims under federal Reclamation law.

The First Interim Report consists of three primary sections that are addressed herein. The first is an extensive recitation of factual findings, citations from the historical record, quotations from secondary sources, and conclusions of law reached by the Special Master. First Interim Report at 9-187. These involve the history of Compact negotiations, the intentions of individual Compact negotiators, and the nature of the apportionment created by the Rio Grande Compact, initially in 1929 with the interim compact of 1929, and ultimately in 1938 with the ratification of the final Compact. *Id.*

Next, the First Interim Report adopted Texas' contention that there is a tacit apportionment made by the Rio Grande Compact that requires deliveries at the state line, impliedly in a "1938 condition," not at Elephant Butte Reservoir as stated in Article IV of the Compact and as historically administered by the Rio Grande Compact Commission. *Id.* at 187-217. As described in Point II, *infra*, this creates a second apportionment in the Lower Rio Grande that could undermine the Article IV apportionment in the Middle Rio Grande and conflicts with the debits and credits provision of Article VI.

Finally, the First Interim Report addresses the United States' Complaint in Intervention insofar as it alleges that all groundwater and surface water below Elephant Butte Reservoir are Project water. *Id.* at

217-37. According to the United States' Complaint in Intervention, any New Mexican who uses groundwater or surface water from Elephant Butte Reservoir down to the New Mexico-Texas state line must first obtain a contract with the federal government. The result is that the United States, not New Mexico, would administer all groundwater and surface water below Elephant Butte Reservoir.[4]

## SUMMARY OF ARGUMENT

None of the parties have addressed the potential impact of the recommendations in the First Interim Report on administration of the Rio Grande Compact upstream of Elephant Butte Reservoir and potential further usurping of New Mexico's jurisdiction to administer water in the Middle Rio Grande. The Water Authority addresses those issues herein.

First, contrary to Fed. R. Civ. P. 12, the Special Master used extensive materials outside the record to make his recommendations on New Mexico's Motions to Dismiss, without having afforded New Mexico the opportunity to respond. *See infra* Point I.

[4] While the United States' Complaint in Intervention alleges that New Mexico has allowed diversions of surface water and hydrologically connected groundwater below Elephant Butte Reservoir, for practical purposes this equates to nearly all groundwater in New Mexico below Elephant Butte Reservoir because of the existing hydrologic connection of even deep stored groundwater.

Second, in recommending denial of New Mexico's Motion to Dismiss Texas' Complaint, the Special Master failed to recognize that both the "plain meaning" and the historical record he cited preclude a fixed delivery obligation or a second apportionment below Elephant Butte Reservoir based on an alleged "1938 condition" delivery obligation. *See infra* Point II. The apportionment mechanisms in Articles IV and VI were designed to preclude a "1938 condition" under the Rio Grande Compact that requires a fixed delivery obligation. A fixed delivery obligation at the New Mexico-Texas state line could very well implicate the delivery obligations upstream of Elephant Butte Reservoir, including the administration of the Rio Grande under Articles III, IV, and VI of the Compact. Said differently, a fixed downstream delivery obligation is incompatible with a flexible upstream delivery obligation. A fixed delivery obligation at the New Mexico-Texas state line based upon a "1938 condition" threatens to upend the delivery obligations in Articles III and IV of the Compact and the debits and credits provision of Article VI, contrary to historical Compact administration and accounting and to the detriment of the Water Authority and the Middle Rio Grande.

Third, with respect to its Complaint in Intervention, the United States goes significantly beyond Texas' Complaint and seeks federalization of the Rio Grande below Elephant Butte Reservoir, claiming it should administer all surface water and groundwater in that river reach through federal contracts. *See infra* Point III. While finding that the United States has not

stated a cause of action under the Rio Grande Compact, the Special Master nonetheless recommends that the United States be allowed to pursue federal Reclamation claims under the Court's discretionary, non-exclusive original jurisdiction, something that is almost never allowed. *See* 28 U.S.C. § 1251(b)(2). His recommendation risks a federalization of the entire Rio Grande, with all surface water and hydrologically connected groundwater users in New Mexico being regulated by the United States when a federal Reclamation project is implicated. This is contrary to *California v. United States*, 438 U.S. 645 (1978) and *United States v. New Mexico*, 438 U.S. 696 (1978) which hold that states have plenary control over the waters within their borders. The United States' argument and the Special Master's recommendation in this regard place the Water Authority's groundwater rights obtained under state law at risk.

## ARGUMENT

### POINT I

### THE FIRST INTERIM REPORT SHOULD BE REJECTED FOR RELYING ON EXTRINSIC EVIDENCE FOR WHICH NOTICE AND OPPORTUNITY TO RESPOND WERE NOT GIVEN

New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention, Apr. 2014 ("New Mexico's Motion to Dismiss") is governed

by Fed. R. Civ. P. 12(b)(6).[5] With respect to Texas' Complaint, New Mexico's Motion to Dismiss asserted that no claim had been stated under the Rio Grande Compact requiring New Mexico to deliver Texas' water to the New Mexico-Texas state line, and that "[t]he Compact does not require New Mexico to maintain depletions within the Rio Grande Basin in New Mexico below Elephant Butte at the levels existing as of 1938." *See* New Mexico's Motion to Dismiss at 1.

With respect to the United States' Complaint in Intervention, New Mexico alleged that no claim had been stated under the Compact because "[t]he Compact imposes no affirmative duty on New Mexico to prevent interference with deliveries of Rio Grande Project ("Project") water by the United States. Nor can the United States, which is not a party to the Compact, assert claims based on the Compact." *Id.*

In neither case did New Mexico argue that it can release water from Elephant Butte Reservoir and "grab it back" before it gets to Texas. First Interim Report at 202. Instead, New Mexico relies on state and federal law that apply to the administration of water for Bureau of Reclamation projects, including

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[5] Pursuant to Sup. Ct. Rule 17.2 for Procedure in an Original Action, "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed." *Ibid.*

the administration of return flows and seepage, to supplement Project supply.[6]

A complaint must "state a claim to relief that is plausible on its face." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). This applies to the factual allegations of a complaint. It requires "some minimal factual exposition sufficient to state a claim that is 'plausible on its face' in order to survive a motion to dismiss." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE, § 12.34[1][a] (3d ed. 2017). When the Court considers matters outside the pleadings, the motion is converted into one for summary judgment. As set forth below, this entails the requirement of notice to the parties and opportunity to respond. The anomaly with respect to the First Interim Report is the extensive research into primary archival and secondary sources that was undertaken by the Special Master on his own. *See* First Interim Report at 9-187. Much of the substantive historical and factual research used by the Special Master in the recommendation section of the First Interim Report is selective, incomplete, and subject to contrary conclusions. *Id.* at 187-237.

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[6] The Special Master's recommendation has the potential to aid the United States in yet another case of a federal water grab in which the United States is attempting to usurp control of state water resources. *See, e.g.*, *United States v. New Mexico*, 438 U.S. 696 (1978); *California v. United States*, 438 U.S. 645 (1978); *United States v. Nevada*, 463 U.S. 110 (1983); proposed EPA and COE *"Waters of the United States Rule,"* 79 Fed. Reg. at 22,198; *Nat'l Ski Areas Assoc., Inc. v. United States Forest Service, et al.* (D. Colo., No. 12-CV-00048-WJM, Dec. 19, 2012).

The First Interim Report begins with an exhaustive review of archival documents, evidence from the Compact negotiations, law review articles, and other secondary sources including Douglas R. Littlefield's treatise *Conflict on the Rio Grande: Water and the Law, 1879-1939* (Univ. of Calif. Press 2008).[7] The Index of Material Provided on DVD contains 27 documents. *See* First Interim Report at vii-xiii. Other source material, cited as authority, is indexed. *Id.* at xxviii-xlix. This evidence had not been submitted by the parties. Moreover, the documents provided on DVD constitute only a portion of the source material cited in the Table of Authorities.

The First Interim Report cites *Arizona v. California*, 373 U.S. 546, 552 (1963) as if it were comparable. It is not. *Arizona v. California* was a case to determine Arizona's share of the apportionment made by the Colorado River Compact. The development of the "meaning and scope" of the Colorado River Compact referred to by the Special Master was part of a trial process lasting two years "during which 340 witnesses were heard orally or by deposition, thousands of exhibits were received, and 25,000 pages of transcript were filled." 373 U.S. at 551. Critically, admissible evidence was governed by the Federal Rules of Evidence. Post-trial proceedings lasted three years. As the Court explained:

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[7] The significant extent of independent research and collection of historical documents related to the Rio Grande Compact and its administration performed by the Special Master, including independent factual research at various archives, is described in detail in his petitions for fees filed with the Court.

"Following many motions, arguments, and briefs, the Master, in a 433-page volume, reported his findings, conclusions, and recommended decree. . . ." *Id.* This extensive fact finding and post-trial briefing process bears no resemblance to this 12(b)(6) motion to dismiss.

> The Special Master nevertheless states that:
>
> [C]onsistent with *Arizona v. California*, 373 U.S. 546, 552 (1963), this report and recommendation recounts the relevant legislative and negotiating history in order to give the Compact context. However, nothing detailed herein should be construed as fact finding violative of Fed. R. Civ. P. 12, as nothing in the historical record was dispositive regarding the ultimate recommendations of the report.

First Interim Report at 193. As shown from those portions of the First Interim Report addressed in this brief, the authority cited by the Special Master in support of his conclusions and analyses suggests otherwise. *Id.* at 198-217.

Under Fed. R. Civ. P. 12(b)(6): "[i]n deciding whether to dismiss, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[2] (3d ed. 2017); *see, e.g.*, *Gines v. D.R. Horton, Inc.*, 699 F.3d 812, 820 (5th Cir. 2012); *Luis v. Zang*, 833 F.3d 619, 632 (6th Cir. 2016). Typically, "once the court

decides to accept 'matters outside the pleadings,' the motion will be treated as one for summary judgment and disposed of as provided in Rule 56." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[3][a] (3d ed. 2017). The purpose of this is to ensure that "'all parties' are 'given a reasonable opportunity to present the material that is pertinent,' to a Rule 56 summary judgment motion." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[3][b] (3d ed. 2017). Moore explains that the purpose:

> is that the court must make sure that the parties know that the court is considering rendering a summary judgment in the matter. In addition, the court must give the parties a fair opportunity, a reasonable amount of time, to assemble summary judgment affidavits and other supporting and opposing materials and present them to the court.

*Id.*; *In re Rockefeller Ctr. Props. Sec. Litig.*, 184 F.3d 280, 287-89 (3d Cir. 1999); *Krijn v. Pogue Simone Real Estate Co.*, 896 F.2d 687 (2d Cir. 1990).

In recommending denial of New Mexico's Motion to Dismiss, the Special Master stated that "[u]nder Rule 12(b)(6), all factual allegations contained in Texas's Complaint and the United States' Complaint in Intervention are assumed to be true. [citing] *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969)." First Interim Report at 191. The Special Master then proceeded to analyze Texas' Complaint and the apportionment created by the Rio Grande Compact. *Id.* at 194-217. He reached

several conclusions set forth in the First Interim Report headings, most of which relied on matters which were beyond the four corners of the complaint. These include the findings that: "Texas has stated a claim under the unambiguous text and structure of the 1938 Compact" (*id.* at 194-95); "[t]he structure of the 1938 Compact integrates the Rio Grande Project wholly and completely. . . ." (*id.* at 198-203); and "[t]he purpose and history of the 1938 Compact confirm the reading that New Mexico is prohibited from recapturing water it has delivered to the Rio Grande Project after Project water is released from the Elephant Butte Reservoir" (*id.* at 203-09).

These conclusions, however, are not clear or "unambiguous." They do not reflect the "plain meaning" of unambiguous Compact provisions. Instead, these conclusions are reached by use of extrinsic evidence. For example, the sections on "the purpose and history of the 1938 Compact" uses five extrinsic documents from the DVD. First Interim Report at 203-09. These conclusions contradict the Special Master's cited authority that "[a] compact's express terms are 'the best indication of the intent of the parties,' [citing] *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) [quoting] *Montana v. Wyoming*, 131 S. Ct. 1765, 1771-72 & n.4 (2011); RESTATEMENT (SECOND) OF CONTRACTS § 203(b) (1979))." First Interim Report at 193.

Because the First Interim Report relies extensively on extrinsic factual evidence developed independently by the Special Master from outside the

record, for which response should have been allowed, the parties and *amici* must now respond and it requires rejection of the First Interim Report by the Court, except as set forth *supra* at n.2.

## POINT II

## THE EFFECT OF A DELIVERY OBLIGATION BELOW ELEPHANT BUTTE RESERVOIR ON THE APPORTIONMENT IN THE MIDDLE RIO GRANDE HAS NOT BEEN CONSIDERED

The Special Master concludes that "the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir." First Interim Report at 197. He asserts that New Mexico "disregards the text of Article IV and renders the common and straightforward meanings of the terms 'obligation' and 'deliver' in Article IV void" by allowing downstream diversions after the Compact water has been released from Elephant Butte Reservoir. *Id.* This necessarily equates to a state line delivery obligation. Combined with Texas' contention that New Mexico could make no additional depletions beyond those that existed when the Compact was entered, the result, if accepted by the Court, would be an interpretation of the Compact that would require a state line delivery obligation based upon a "1938 condition." *See* Texas' Complaint at ¶ 18.

The conclusion reached by the Special Master is not contemplated in the Compact which apportions water on the bases of Articles IV and VI in the Middle Rio Grande and Upper Rio Grande. In fact, a fixed delivery obligation below Elephant Butte Reservoir will have repercussions in the Middle Rio Grande.

The Water Authority is concerned about potential adverse changes in Rio Grande Compact administration and accounting upstream in the Middle Rio Grande, because it is not clear how New Mexico can make a fixed state line delivery based upon a purported "1938 condition" and keep a flexible delivery obligation upstream as contemplated and historically administered under Compact Articles III, IV, and VI.

## A. The Rio Grande Compact does not contain a state line delivery obligation.

Under Article IV of the Rio Grande Compact, New Mexico is required to deliver an amount of water that is determined by a schedule that varies from year to year with the amount of water in the Rio Grande at the Otowi Gage. The "plain meaning" of Article IV is that New Mexico's obligation is "to deliver water in the Rio Grande into [Elephant Butte Reservoir] during each calendar year [which] shall be measured by that quantity set forth in the following tabulation of relationship which corresponds to the quantity at the upper index station: . . . ." *See* Rio Grande Compact Article IV. The table in Article IV then shows the

relationship between inflow measured at Otowi Gage and outflow required at the point of delivery measured in thousands of acre-feet. *Id.* The express language in Article IV constitutes the "plain meaning" of New Mexico's delivery obligation. There is no language in the Compact for a state line delivery obligation corresponding to a "1938 condition."

Articles IV, VI, VII, and VIII do not mention or reference the administration of releases into the Lower Rio Grande. Each is concerned with restrictions on diversion of Rio Grande water upstream of Elephant Butte Reservoir. Article IV sets the delivery obligation at Elephant Butte Reservoir based upon inflows at Otowi Gage. Article VI, the "credits and debits" provision, provides flexibility to the two upstream states to meet delivery obligations under variable river flow conditions. Colorado can accrue up to 100,000 acre-feet of debits; New Mexico can accrue up to 200,000 acre-feet of debits. In practice, during the extended period of debit administration between 1943-1985, Colorado accrued 939,900 acre-feet of debits by December 31, 1965, and New Mexico accrued 420,000 acre-feet of debits by the end of 1966. *See* Complaint and Colorado Answer in *Texas and New Mexico v. Colorado*, No. 29, Original. That accounting applied to water diverted in Colorado's San Luis Valley and New Mexico's Middle Rio Grande. It had nothing to do with the Lower Rio Grande. These Compact provisions, focused upstream of Elephant Butte Reservoir, have provided for the administration of state-based water rights under the Rio

Grande Compact for 80 years and New Mexico's obligation under the Compact. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

The key documents appended to the First Interim Report show that Texas' negotiators in 1938 sought to include an express apportionment of released water below the Reservoir but ultimately rejected this approach because a separate division of released water was effectuated by Bureau of Reclamation contracts apart from the Rio Grande Compact.[8] This rendered an apportionment of water released from Elephant Butte Reservoir unnecessary in Texas' view. Accordingly, no state line apportionment was made in the Compact and one should not be imputed now. *See Conflict on the Rio Grande, Water and the Law, 1879-1939,* Littlefield, D.L., at 213-14.

The issue arose during the negotiations by Texas' concern that there was no language in the Compact which assured that Texas would get any water. Writing to Frank Clayton, Rio Grande Compact Commissioner for Texas in 1938, Sawnie B. Smith, an attorney representing the Water Commission Association of the Lower Rio Grande Valley, stated that the proposed Rio Grande Compact "makes no provision for the division

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[8] Rather than have the Special Master research the historical record and reach his own conclusions about the history of Compact negotiations, a more common practice is for expert historians to undertake this research in which they have education and training and present their opinions to the Special Master at trial under the Federal Rules of Civil Procedure. *See Kansas v. Colorado*, No. 105, Original, and *Nebraska v. Wyoming*, No. 108, Original.

of waters below Elephant Butte between the States of New Mexico and Texas and makes no provision concerning the amount of water to which Texas is entitled." Letter from Sawnie B. Smith to Frank B. Clayton, Sept. 29, 1938, Box 2F466, Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, Univ. of Texas at Austin (DVD Doc. 25). Smith considered that this omission was "too obvious to have been inadvertent, and, therefore, unquestionably, the Commissioners had what they considered valid reason for it." *Id.* Smith nevertheless wanted an explanation of "why the respective rights of Texas and New Mexico to these waters were not defined and provided for in the compact in express terms." *Id.* In reply, Clayton explained that the negotiators for the Rio Grande Compact had recognized an existing division of the waters between New Mexico and Texas through the allocation made by the Bureau of Reclamation. Clayton stated: "the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation." Letter from Frank B. Clayton to Sawnie B. Smith, Oct. 4, 1938, Box 2F466, Rio Grande Compact Commission Records, Dolph Briscoe Center for American History, Univ. of Texas at Austin (DVD Doc. 26). He continued: "[b]y virtue of the contract recently executed [the 1938 inter district agreement], the total area is 'frozen' at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for the Elephant Butte Irrigation District, and 67,000 for the El Paso County Water Improvement District No. 1, with a 'cushion' of three per cent. [sic] for each figure." *Id.*

The Special Master incorrectly concluded that the Rio Grande Compact requires a state line delivery, with consequences to the Middle Rio Grande.

### B. There is no delivery obligation pursuant to a "1938 condition."

Texas argues that the "1938 condition" should be imposed on New Mexico as it relates to a purported delivery obligation at the state line because "[t]he Rio Grande Compact is predicated on the understanding that delivery of water at the New Mexico-Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed." *See* Texas' Complaint at ¶ 18. As set forth above, the basis for this is flawed because the Rio Grande Compact and the Rio Grande Project are not interchangeable and the obligations within them are separate and distinct. The Special Master recognizes this distinction because he recommended that the United States' Complaint in Intervention not be allowed under the Court's original jurisdiction in relation to Rio Grande Compact claims, but instead, recommended that the United States be allowed to pursue claims under federal Reclamation law pursuant to the Court's discretionary, non-exclusive original jurisdiction. *See* First Interim Report at 217-37.

The Rio Grande Project utilizes the stored water in Elephant Butte Reservoir to deliver irrigation water to the two Project beneficiaries, namely the New Mexico irrigation district, Elephant Butte Irrigation

District ("EBID"), and the Texas irrigation district, El Paso County Water Improvement District No. 1 ("EP No. 1"). The Rio Grande Compact obligation ends at the delivery point which is Elephant Butte Reservoir. The obligation to deliver water from Elephant Butte Reservoir to EBID and EP No. 1 resides in the contracts between the parties and the operator of the Rio Grande Project, namely the United States.

The purported "1938 condition" arises out the original contract arrangement between the three parties in which the irrigated acreages were used to divide the available supply between EBID and EP No. 1, 57% and 43% respectively. As historical Compact administration makes clear, however, there is no "1938 condition."

Texas contends a "1938 condition" applies to New Mexico, although Texas' own actions have changed this purported baseline many times, demonstrating that such a delivery obligation does not exist. First, Texas has allowed groundwater pumping for the City of El Paso and others which affects the Rio Grande in both New Mexico and Texas. While Texas has alleged that groundwater pumping in New Mexico has depleted Project supplies, the same can be said of Texas.

Second, EP No. 1 has transferred water from irrigation to municipal use for the City of El Paso. If the Rio Grande Project requires that deliveries be made based on irrigation demands, then reduction in irrigation demands due to the transfer of that water to

municipal use is a change from the supposed "1938 condition."[9]

Third, Texas completed its own state adjudication of water rights in 2007 which accounted for uses that were not present in 1938 and therefore has changed both the river and the stream connected groundwater in Texas. The United States agreed to the Texas adjudication, but it is not clear whether that agreement included acceptance of additional depletions, thereby changing the amount of water released from Elephant Butte Reservoir to meet EP No. 1's irrigation demands after 2007 as compared to the alleged "1938 condition." Given the significant increase in groundwater use in Texas, it is highly likely that it did result in a change to the Elephant Butte Reservoir release quantity.

Finally, the 2008 Operating Agreement, which was agreed to among the United States, EBID, and EP No. 1, uses a regression analysis to determine annual allotments between the two irrigation districts which is based on 1951-1978 hydrologic conditions. *See* United States' Memorandum in Support of Motion to Intervene as a Plaintiff, Feb. 2014 ("United States' Memorandum in Support") at 5-6. Clearly, the 1951-1978 hydrologic conditions are not "1938 conditions." While

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[9] The Water Authority understands that water rights for agricultural purposes can be transferred to municipal purpose but the amount transferred is typically the consumptive use portion of the water right and therefore there is still some portion needed to convey the water through the irrigation system. Moreover, a departure in the purpose of use in Texas from irrigation to municipal use is a change in the purported "1938 condition."

contending on one hand that it continues to follow the 1938 diversion allocations of 57% for EBID and 43% for EP No. 1, the United States admits the opposite is true: "[t]he effect of the 2008 Operating Agreement is that EBID agrees to forgo a portion of its Project deliveries to account for changes in Project efficiency caused by groundwater pumping in New Mexico." *Id.* at 6. If EBID has reduced allocations, as the United States admits, there is necessarily a change in the "1938 condition."

The significant departure from the claimed "1938 condition" is further illustrated in the Final Environmental Impact Statement for the 2008 Operating Agreement. *See Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas, Final Environmental Impact Statement* (U.S. Bureau of Reclamation, Sept. 30, 2016) (https://www.usbr.gov/uc/envdocs/eis/pdf/2008OperatingAgreementRioGrandeEIS_Final.pdf). In that document, the Bureau of Reclamation finds that EBID's allocation would provide an average of 314,327 acre-feet per year under the no action alternative (current allocation accounting) versus an average of 213,110 acre-feet per year if the 2008 Operating Agreement accounting procedures are adopted. *Id.* at iii. Conversely, EP No. 1 would receive an average of 239,317 acre-feet per year under the no action (current allocation accounting) and 224,049 acre-feet per year on average with 2008 Operating Agreement accounting procedures. *Id.* In other words, under the 2008 Operating Agreement, EBID is to forego an average of almost 100,000

acre-feet per year and on average will receive about 10,000 acre-feet per year less than EP No. 1. There is no semblance of a "1938 condition" or an allocation based upon irrigation demands of 57% to EBID, 43% to EP No. 1 as alleged in Texas' Complaint.

### C. Potential adverse effects for the Water Authority and Middle Rio Grande.

The Special Master's recommendation of a fixed delivery obligation at the state line is a concern for the Water Authority, especially when combined with Texas' contention that such deliveries must be premised on a "1938 condition." Neither the Special Master nor Texas has addressed how a fixed state line delivery obligation based upon a "1938 condition" can be administered under the Rio Grande Compact consistent with the flexible accounting allowed under Articles IV and VI. The latitude provided to New Mexico by Articles IV and VI of the Compact is called into question by the Special Master's recommendations in his First Interim Report. The consequences of the recommendations in the First Interim Report could likely be unanticipated results in the Middle Rio Grande.

## POINT III

## THE UNITED STATES SHOULD NOT BE GRANTED LEAVE TO LITIGATE CLAIMS TO FEDERALIZE THE LOWER RIO GRANDE

In its Complaint in Intervention, the United States alleges that:

> 13. New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts.

*See* United States' Complaint in Intervention at ¶ 13. It contends that all surface water and groundwater below Elephant Butte Reservoir is Rio Grande Project water, that only entities having contracts with the Secretary are entitled to Project water, and that the only entity in New Mexico with a water supply contract with the Secretary is EBID. *Id.* at ¶ 12.

The Special Master recommended that because the United States has made allegations that even if assumed to be true, do not plausibly give rise to an entitlement of relief, *viz.*, enforcement of the Rio Grande Compact, New Mexico's Motion to Dismiss under Fed. R. Civ. P. 12(b)(6) should be granted. The First Interim Report states:

> The fact that the three signatory States to the 1938 Compact chose to use the Rio Grande Project, which had been in operation for years prior to the negotiation and signing of the compact, as the sole vehicle by which to apportion Rio Grande waters to Texas and New Mexico below Elephant Butte Reservoir does not give the United States a right of action under the 1938 Compact.

First Interim Report at 230. The Special Master concluded: "[t]he 1938 Compact apportions no water to the United States; therefore, the United States cannot state a claim under the Compact against New Mexico." *Id.* at 231.

The Special Master nevertheless recommended that the United States be granted leave to pursue its Complaint in Intervention based upon federal Reclamation law, not the Compact. *Id.* at 231-37.

The United States is claiming the right to administer all surface water and groundwater in the Lower Rio Grande in New Mexico, assuming all groundwater is hydrologically connected to the surface water. The effect of the United States' argument is to federalize this section of the Rio Grande raising issues as to the validity of state-based water rights. The same principle could be applied in the Middle Rio Grande to the detriment of the Water Authority and is not supported by state or federal law.

As a result of the Public Land Acts of 1866, 1870, and the Desert Land Act of 1877, ownership of the United States in non-navigable waters was severed from the public domain and vested in the western states and territories. *See United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702-09 (1899). The principle was confirmed several years later by the Court:

> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris, subject to the plenary control of the*

> *designated states*, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "Congress cannot enforce either rule upon any state," *Kansas v. Colorado*, 206 U.S. 46, 94, the full power of choice must remain with the state.

*California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-164 (1935) (emphasis added). *See also California v. United States*, 438 U.S. 645 (1978); *United States v. New Mexico*, 438 U.S. 696 (1978). Accordingly, New Mexico, not the United States, has the ability to regulate and administer surface water and groundwater rights in the Lower Rio Grande.

New Mexico has been at the forefront of western states in the conjunctive administration of surface water and groundwater. More than a half century ago, the New Mexico State Engineer's authority to conjunctively manage surface water and groundwater was recognized in *Albuquerque v. Reynolds*, 1962-NMSC-173, 71 N.M. 428, 379 P.2d 73. In that case, the New Mexico Supreme Court recognized the interconnection of groundwater hydrologically connected to the Rio Grande in the Middle Rio Grande following the State Engineer's declaration of the Rio Grande Underground Water Basin on November 29, 1956. New appropriations of groundwater initiated by permit of the State Engineer after that date were required to "offset" the effects of their pumping on the Rio Grande by obtaining "offset" rights in the amount of the depletive effect

on the Rio Grande. This was done in part to ensure compliance with New Mexico's delivery obligation under the Rio Grande Compact.

There are additional consequences that flow from the recommendations in the First Interim Report on surface water and groundwater administration in Texas. If accepted by the Court, the Special Master's recommendation that the United States administers all surface water and groundwater in the Rio Grande Project necessarily means that the United States administration in this regard must continue to Ft. Quitman, Texas, and not stop at the New Mexico-Texas state line. If all New Mexico surface water and groundwater users below Elephant Butte Reservoir were required to have federal Reclamation contracts, the same would be true for all surface water and groundwater users in Texas above Ft. Quitman. This is critical because inefficiencies or changes in water use in Texas necessarily affects releases upstream just as Texas has claimed against New Mexico. Groundwater pumping in Texas affects drains and return flows, not just in Texas, but also in New Mexico. If the alleged "1938 condition" is required in New Mexico, then it is required in Texas such that all changes in water use after 1938 that affected deliveries to EP No. 1 including reduction in return flows, seepage and groundwater returns to the surface water system must be accounted for and Texas held accountable.

The United States' contention that it has administration and control over all surface water and groundwater in the Lower Rio Grande could also have

significant adverse consequences for the Water Authority. *See* United States' Complaint in Intervention at ¶¶ 12, 13. The Bureau of Reclamation operates El Vado Dam and delivers water to the Middle Rio Grande Conservancy District and the six Middle Rio Grande Pueblos. The United States could make a similar argument of the need to control groundwater use in the Middle Rio Grande from Otowi Gage to Elephant Butte Reservoir under the same premise. Assuming the United States prevailed and all groundwater is hydrologically connected to the surface water, the Water Authority could be forced to enter into water supply contracts with the United States rather than rely on its state-based groundwater rights. Whether it is in the Middle Rio Grande or Lower Rio Grande, municipalities have relied on state-based groundwater administration for more than a century and the United States has acquiesced in that practice. As the Court confirmed in *Nebraska v. Wyoming*, 507 U.S. 584 (1993), long-standing acquiescence in an administrative practice can foreclose later arguments to the contrary. *Ibid.* at 595 ("And even if the issue was not previously determined [in prior litigation], we would agree with the Special Master that Wyoming's arguments are foreclosed by its postdecree acquiescence.")

Beyond the Rio Grande, the Bureau of Reclamation operates many federal Reclamation projects throughout the western United States for which this same argument could be made and therefore, use this precedent to federalize all stream-connected aquifers

where downstream delivery obligations exist. *See supra* at n.6.

## CONCLUSION

The recommendations in the First Interim Report far exceed the bounds of a Rule 12(b)(6) motion to dismiss. Findings of fact and conclusions of law contained therein are not based upon evidence elicited at trial with procedural safeguards afforded by the Federal Rules of Evidence. The Special Master's interpretation of various Rio Grande Compact provisions has not had the benefit of discovery, a trial and briefing to explicate the meaning of the Compact, as also informed by historical Project administration. The recommendations in the First Interim Report have potential adverse effects upstream of Elephant Butte Reservoir, including the effects on the Water Authority and the Middle Rio Grande that have not been briefed by the parties or considered by the Special Master. In ruling on New Mexico's Motions to Dismiss, the Court should reject

the First Interim Report, except as set forth *supra* in n.2.

Respectfully submitted,

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